sense' and that the Exchequer Court was, therefore, without jurisdiction to entertain this action.

"I would, therefore, dismiss this appeal with costs."

Flota Maritima Browning de Cuba, S.A. v. *The Republic of Cuba*, [1962] S.C.R. 598 (1962), 34 D.L.R. (2d) 629.

A note on this case in Castel, *International Law, Chiefly as Interpreted and Applied in Canada* (1965), p. 686, reads in part:

> "The case is very important because this is the first time the [Canadian] Supreme Court has acknowledged the modern distinction between the operations of a State in its sovereign capacity while carrying on objectives of a national character and its operations of a commercial nature directed toward the achieving of a monetary profit. . . .
>
> "The Court did not have to express any opinion as to whether the doctrine of State immunity should equally apply to property used for commercial purposes only, but the language employed by Ritchie J. when he refused to adopt as unnecessary that part of Lord Atkin's judgment in the *Cristina* in which he expressed the opinion that property of a foreign State 'only used for commercial purposes' is immune from seizure, indicates that the Supreme Court might be prepared to adopt a different rule when commercial transactions are involved."

In commenting on the same case, Bowett wrote:

> "It is, clearly, only a matter of time before English courts will have to face this issue of whether sovereign immunity is general, or limited to the so-called acts *jure imperii*. On this general issue it would seem that the traditional English approach, as evidenced in *The Parlement Belge* [5 P.D. 197 (1880)] or *The Porto Alexandre* [[1920], P. 30], is quite unreal in an age in which many States own and operate vast commercial concerns and, indeed, sometimes are the exclusive owners of sea-going merchant vessels flying their flag. . . . However, whether this problem is best solved by the application of the distinction between acts *jure imperii* and *jure gestionis* is another matter, for it may be argued that by the middle of the twentieth century this distinction is itself archaic. . . ." "Decisions of British Courts during 1962 1963 Involving Questions of Public or Private International Law", Bowett, "Public International Law", XXXIX Brit. Yb. Int'l L. (1963) 473 474.

STAT

Immunity of State-owned ships engaged in trade

In 1950 the United States of America instituted suit in the Supreme Court of Queensland, Australia, to enforce a mortgage against the *Hsin Star*, a ship owned by the National Government of the Republic of China. The consul of the National Government of the Republic of China entered a conditional appearance claiming sovereign immunity. The United States contended, *inter alia*, that the doctrine of sovereign immunity did not apply to State-owned ships engaged in trade. In staying the proceedings on the ground that they impleaded a foreign sovereign State, the Judge stated:

> "It is to my mind clear law that no action or other proceeding can be taken in the Courts of this country against a foreign sovereign state, and it is generally accepted that the property of the foreign sovereign state cannot be seized or arrested, but there is

some doubt whether the principle applies to a ship which is engaged merely in commerce. . . .

"Mr. O'Sullivan (for the plaintiff) argued that the immunity from being impleaded does not apply to a claim in respect of a ship of a foreign state, when the ship as is alleged here, is a trading ship, and he relies on various dicta of some of the judges in *The Cristina* case (*Compañía Naviera Vascongado* v. *s.s. Cristina* (1938), A.C. 485). But when carefully read all that is said in those dicta is that in certain cases the Court has jurisdiction even though a foreign state is interested in the proceedings but refuses to consent to the jurisdiction. . . . The action before me is not an admiralty action *in rem* and in my opinion is in no sense an action *in rem*. . . ."

United States of America v. *Republic of China*, [1950] Int'l L. Rep. 168, 169-170 (No. 43).

In 1950 the United States claimed the vessel *Hai Hsuan* in Singapore in virtue of an hypothecation and obtained an injunction to restrain the acting captain and the third officer from taking the vessel out of Singapore. Defendants claimed that they were in possession of the vessel on behalf of the "People's Republic of China" and that the proceedings impleaded that foreign sovereign. The United States contended that a merchant vessel engaging in trade was not entitled to sovereign immunity. The High Court of Singapore set aside the proceedings on the ground of sovereign immunity. The Court stated:

"By consent the parties agreed to be bound by certain answers given by the Foreign Office to the Supreme Court of Hong Kong. By those answers it is clear that 'The Central People's Government of the People's Republic of China' is recognised both *de facto* and *de jure* as the only Government of China.

"The ship is registered in Formosa, which is legally part of the Japanese Empire and not apparently *de facto* under the control of the recognised Government of China. The defendants claim that the ship is the property of the present Government of China. They base this claim on two grounds, that it was part of the property of the former Government of China, and as such property would pass to the present Government from the moment of recognition. They also claim the property as the result of legislative act of the present Government. It is admitted that the ship has not been at any material time within the territorial waters of China. The defendants also claim that the present Government is in possession of the ship by reason of the fact that they, the defendants, are holding the ship on behalf of that Government.

"I am not satisfied at the moment that the ship was the property of the former Government as distinct from a corporation wholly or almost wholly owned by that Government. I express no opinion as to the effect of the legislation of the Government of China on the ownership of property outside China.

"On the ground of possession, I consider that the matter is concluded by the case of *The Cristina* (1938) A.C. 485. There a ship whilst absent from the territory of a state was the object of a decree of requisition by the Government of that state. Whilst the ship was in British territory the Government of that state, apparently quite illegally, obtained possession of that ship by putting on board a crew that was willing to hold it on behalf of that Government. The House of Lords affirmed a decision setting aside a writ and subsequent proceedings on the part of the owners on the ground that the possession was that of a sovereign state. The decision appears to be based entirely on the *de facto* possession by a crew in sympathy with the Government and of the crew I suppose that only the sympathies of the captain were material. The learned Lords were, I take it, all of the opinion that the legality or otherwise of the acts which led to possession were immaterial. Further, I do not consider that the decision is any authority on the effect of requisition by a foreign state of property without its jurisdiction. Juristically requisition would be in the same position as confiscation for this purpose. The case of *The Jupiter* (1924) P. 236 was expressly approved.

"This is enough to decide the present case except for one matter raised by Mr. Smith for the plaintiffs. That matter was the proposition that the immunity did not apply to merchant ships engaged in earning freight. It is true that three Lords reserved their opinion on that point in *The Cristina*. If they had any serious doubts on that point they might have applied them, because the *Cristina* was a commercial ship seized in the course of a commercial voyage and which the Government concerned had no opportunity of using for any other purpose, and there the supposition that it was intended to use the ship for any other purpose is only based on conjecture. The reasoning on which all the cases have been decided does not logically have room for any exception of this kind. If this result is inconvenient it can only be obviated by statute.

"I think that the result would be the same in the case of any other kind of property and does not depend on the fact that the property in question is a ship and does not depend on the form of procedure adopted by the plaintiffs. The only relevant consideration is the fact that if these proceedings were successful they would have the effect of depriving the present Government of China of possession."

The Hai Hsuan (*United States of America* v. *Yong Soon Ee*), [1950] Int'l L. Rep. 170–172 (No. 44).

". . . The tendency in civil law jurisdiction is thus towards the view that international law enjoins immunity when a merchant vessel is employed for purposes *jure imperii*. However, a Japanese court has denied this, and held that a Soviet fishery patrol boat which infringed Japanese law in Japanese territorial waters was not immune [*Japan* v. *Kulikov*, [1954] Int'l L. Rep. 105]."

Civil law systems

II O'Connell, *International Law* (1965) 945.

The Inter-American Juridical Committee, in a *Report on Rules Concerning the Immunity of State Ships*, in 1958 concluded:

Recommendation regarding Brussels Convention

"3. The Committee considers that the Brussels Convention of April 10, 1926, and its additional protocol of May 24, 1934, the terms of which are followed by the *Tratado de Navegación Comercial Internacional* (Treaty on International Commercial Navigation), signed at Montevideo in 1940 (articles 34-40), represent at present the progressively accepted doctrine, which is expressed satisfactorily in those international instruments."

Inter-American Juridical Committee, *Report on Rules Concerning the Immunity of State Ships* (CIJ 36, English) (Pan American Union, January 1958), p. 13.

For text of the Brussels Convention of Apr. 10, 1926 (Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships), and its additional protocol of May 24, 1934 (Protocol Supplementary to the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships of Apr. 10, 1926), see 176 LNTS 199, 215.

For text in English translation of the Treaty on International Commercial Navigation, Montevideo, Mar. 19, 1940, articles 34-40, see VIII Hudson, *International Legislation, 1938-1941* (1949) 460, 468-470.

The Inter-American Juridical Committee, in its 1958 Report presented "the principles embodied in the Convention of Brussels and its additional protocol" as follows:

"*First:* The state has the same liability as private parties insofar as concerns claims relating to commercial activity carried out by the state through cargo and passenger vessels. Therefore, the same rules of liability and the same obligations are in effect (article 1).

"*Second:* Such liabilities and obligations are subjected to the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as are established and applicable to private parties. Merchant vessels and their commercial cargoes shall therefore be subject to seizure, attachment or detention by any legal process, or to such judicial proceedings *in rem* as may be appropriate (article 2).

"*Third:* The same rules concerning jurisdiction and the same legal actions shall be applicable in case of claims relating to state-owned cargoes transported on merchant vessels for governmental and noncommercial purposes. But such cargoes shall not be subject to seizure, attachment or detention by any legal process, nor to any judicial proceedings *in rem* (article 3.III).

"*Fourth:* The state may plead all measures of defense, prescription, and limitation of liability, which are available to private parties (article 4.I).

"*Fifth:* Claims can be brought against ships of war and other state vessels used at the time a cause of action arises exclusively on governmental and noncommercial service solely in the competent

tribunals of the state owning or operating the vessel, without that state being permitted to avail itself of its immunity. But such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*. The same rules apply to the state-owned cargoes carried on board these vessels (article 3.I.II).

"*Sixth:* Depending on circumstances, the foregoing provisions are equally applicable in cases of vessels used by states (articles 1, 2, and 3).

"*Seventh:* Provisions relative to measures of defense, prescription, and limitation of liability shall be subject to modification by means of special conventions or national legislation so as to make them applicable to ships of war, or similar vessels (article 4.2).

"*Eighth:* If there is a doubt as to the governmental and noncommercial character of the vessel or cargo, it shall be settled by a certificate signed by the diplomatic representative of the interested state, but only for the purpose of securing a release from seizure, attachment, or detention ordered by legal process (article 5).

"*Ninth:* The benefits of the foregoing provisions may be extended to noncontracting states solely on the basis of reciprocity (article 6).

"*Tenth:* Contracting states reserve the right to suspend the application of this convention in time of war, the right to take any measures that the status of neutrality may demand, and the right to regulate by its own laws the rights accorded to its own nationals in its own courts (articles 7, 8, and 6.2). In the first instance, the suspension only affects the attachment, seizure, or detention, and the claimant still has the right to bring his action before the court that is competent in such case (article 7, last part)."

Inter-American Juridical Committee, *Report on Rules Concerning the Immunity of State Ships*, *op. cit.*, pp. 8–9.

As to the parties to the Convention, the 1958 Report stated:

> "Moreover, the Brussels Convention, originally ratified by Belgium, Brazil, Chile, Esthonia, and Hungary, and later by Denmark, Germany, Holland and its possessions (Curaçao, Dutch East Indies, and Surinam), Italy and its colonies, Norway, Poland, Portugal, Rumania, and Sweden, was also ratified by France only two years ago (1955), and was adhered to by Greece (1951) and Switzerland (1954). It is significant that none of these 17 countries have renounced the convention or have, in conformity with the provision of article 4, called for 'a fresh conference with a view to considering possible amendments'." *Ibid.*, p. 12. Subsequent to the 1958 Report, the following States have acceded to the Convention: Turkey, United Arab Republic, Argentina, Syria. Department of State Treaty File.

Convention on Territorial Sea and Contiguous Zone, 1958

Article 20 in section III, "Right of Innocent Passage", of the 1958 Convention on the Territorial Sea and the Contiguous Zone reads:

> "1. The coastal State shall not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

"2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

"3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."

Article 21 of the Convention further provides:

"The rules contained in sub-sections A and B shall apply to government ships operated for commercial purposes."

The rules in subsection A (articles 14–17) relate to the right of innocent passage of all ships, and in subsection B (articles 18–23) relate to merchant ships.

Article 22 of the same Convention reads:

"1. The rules contained in sub-section A and in article 18 [on charges] shall apply to government ships operated for non-commercial purposes.

"2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law."

U.S. TIAS 5639; 15 UST 1606, 1612; 516 UNTS 205, 218–220.

See generally Sucharitkul, *State Immunities and Trading Activities in International Law* (1959); Thommen, *Legal Status of Government Merchant Ships in International Law* (1962).

Certain situations involving personal property

"In connection with a suit by an Italian businessman against the Argentine Government for damages for non-fulfillment of a 1948 contract, a Milan judge ordered the sequestration of properties of the Argentine Government found in Italy. The first sequestration, occurring on May 14, [1960] was a jet aircraft of the Argentine State airlines. This was followed on May 16 and May 17 by sequestration of a freighter belonging to the Argentine State merchant fleet and the attachment of Argentine Consulate bank accounts in Milan and Venice. The Argentine Minister of Foreign Affairs termed the pretention to submit the Argentine State to the jurisdiction of a foreign court as . . . in violation of basic principles of international law. The Minister suggested that the Argentine Government would adopt retaliatory measures if the situation were not cleared up. On May 18, the Italian Ministry of Justice issued a decree prohibiting attachment of Argentine Government property without the latter's approval. This appears to have resolved the problem."

American Embassy, Buenos Aires, to the Department of State, despatch No. 1663, May 19, 1960, MS. Department of State, file 235.6541/5–1960.